87-429

No. A-105

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HON. GEORGE A. ADOLF, Judge of the Circuit Court of the City of St. Louis,

Petitioner,

vs.

STATE EX REL. WICHITA FALLS GENERAL HOSPITAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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QUESTION PRESENTED

1. Whether Petitioner, a judge of the Missouri Circuit Court, exceeded his jurisdiction by overruling Respondent's motion to dismiss for want of personal jurisdiction and venue, and by denying Respondent's motion to quash summons and service thereof in the suit below.

Plaintiff in the suit below had received implantation of an improperly blood-matched heart in surgery performed in Missouri. The implanted donated heart was obtained in Texas, where Respondent had negligently performed blood-typing tests in anticipation of transplantation.

Did Respondent's alleged negligent blood typing of the donor heart in Texas set in motion a course of conduct which produced actionable and forseeable consequences in the State of Missouri so as to serve as sufficient contact with the State of Missouri to render Respondent amenable to service of process by virtue of Missouri's long arm statute, Sec. 506.500 R.S.Mo. (1978), and the Due Process clause of the Fourteenth Amendment of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, the Hon. George A. Adolf, Circuit Judge for the 22nd Judicial Circuit, State of Missouri, and the Respondent, Wichita Falls General Hospital, Wichita Falls, Texas.

The Respondent before this Court is Wichita Falls General Hospital, Wichita Falls, Texas.

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No. A-105

IN THE

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OCTOBER TERM, 1987

HON. GEORGE A. ADOLF, Judge of the Circuit Court
of the City of St. Louis,

Petitioner,

vs.

STATE EX REL. WICHITA FALLS GENERAL HOSPITAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

The Petitioner, Hon. George A. Adolf, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, affirmed by the Supreme Court of Missouri, without opinion, entered in the above entitled proceeding on May 19, 1987.

OPINIONS BELOW

The opinions of the Missouri Court of Appeals and Supreme Court of Missouri have not been officially reported as of this date. The Court of Appeals decision, as affirmed by the Missouri Supreme Court without opinion, is reprinted in the appendix hereto page A-4, infra.

JURISDICTION

Invoking federal jurisdiction under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, the Petitioner denied Respondent's motions to dismiss for want of personal jurisdiction and venue and to quash service of summons on December 2, 1986, in the Circuit Court of the City of St. Louis, Missouri.

Respondent thereafter applied for a writ of prohibition in the Missouri Court of Appeals, Eastern District. Said writ was temporarily issued and then made permanent and Petitioner was directed to sustain Respondent's motion to dismiss on March 10, 1987. Petitioner filed a motion for rehearing and/or transfer in the Missouri Court of Appeals which was denied on April 9, 1987.

On August 5, 1987, Justice Blackmun ordered that the time for filing this petition for writ of certiorari be extended to and including September 16, 1987.

The jurisdiction of this Court to review the judgment of the Supreme Court of Missouri and the Missouri Court of Appeals, Eastern District, is invoked under 28 U.S.C. Section 1257(3).

STATUTE INVOLVED

28 U.S.C. Section 1257. State Court; certiorari appeal;

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where in title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

STATEMENT OF THE CASE

Respondent Wichita Falls General Hospital's petition for writ of prohibition arose from a wrongful death medical malpractice action filed by Plaintiff Rose Ottinger against Defendants Wichita Falls General Hospital, of Wichita Falls, Texas, Barnes Hospital, of St. Louis, Missouri, and R. Morton Bolman, III, M.D., of St. Louis, Missouri, in the Circuit Court of the City of St. Louis, Missouri. The suit involved the transplant of a heart into decendent Robert Ottinger by defendant surgeon Dr. Bolman at Barnes Hospital. The transplanted heart was previously harvested from a donor at respondent Wichita Falls General Hospital.

Following service of summons and petition upon them, defendants Bolman and Barnes filed cross-claims against Wichita Falls General Hospital alleging that its negligence was responsible for the alleged damages and injuries caused to plaintiff Rose Ottinger.

Subsequent to service of process upon it, respondent Wichita filed a motion to dismiss arguing that it was not amenable to service of process in the State of Missouri and invoked the due process clauses of the Missouri and United States Constitutions. The motion to dismiss was denied by petitioner Adolf. Respondent then sought a writ of prohibition in the Missouri Court of Appeals, Eastern District, to restrain the Circuit Judge, petitioner Adolf, from exercising *in personam* jurisdiction over it. Respondent argued that it had no "minimum contacts" with the State of Missouri and that petitioner violated its rights under the Due Process Clause. Suggestions in opposition to the Writ were filed by plaintiff Ottinger and defendants Barnes and Bolman. Defendants Bolman and Barnes also filed affidavits in support of their suggestions in opposition to the Writ. (P. A-18, infra).

The Missouri Court of Appeals granted the writ on March 10, 1987, holding that Missouri's exercise of jurisdiction over Wichita Falls General Hospital would offend the limitations of the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

In conformity with the Missouri Rules of Civil Procedure, petitioner filed a motion for rehearing and/or transfer to the Missouri Supreme Court in the Court of appeals which was denied on April 9, 1987. Petition thereafter filed an application for transfer in the Supreme Court of Missouri which was denied on May 19, 1987.

The underlying lawsuit arises from a heart transplant operation performed on Robert Ottinger, the decedent husband of plaintiff, on March 21, 1986, at Barnes Hospital in St. Louis, Missouri. The chief surgeon in charge of the operation was defendant Bolman. Mr. Ottinger, of Bonne Terre, Missouri, had been awaiting a compatible heart for transplantation.

Defendant Dr. Bolman is the head of the heart transplantation unit at the Washington University Medical Center, St.

Louis, Missouri. Dr. Bolman filed an affidavit stating that the Washington University School of Medicine participates in the North American Transplant Coordinators Association and the United Network of Organ Sharing which contain computerized listings of transplant recipients in need of organs. The Southwest Organ Bank, a non-for-profit corporation, of Dallas, Texas, and respondent Wichita Falls General Hospital also participate in this network. All participants understand that organs will be shared interstate according to need and availability. Dr. Bolman's affidavit further stated that the hospitals donating organs in this program, including respondent Wichita Falls General Hospital, are responsible for performing predonation laboratory evaluation of the donor, including accurate blood type determination of the donor's heart. (See text of affidavit, p. A-18, infra).

Bolman's affidavit explained that organs are shared by virtue of communications between independent procurement agencies such as the Southwest Organ Bank in Dallas, Texas, and the Mid-America Transplant Association in St. Louis, Missouri, with various medical centers who have listed a need for organs by potential recipients. Such was the case with decedent Robert Ottinger wherein the North American Transplant Coordinators Association's computer listing was accessed to offer a heart for Robert Ottinger.

Defendant Bolman is aware that the Southwest Organ Bank has contractual arrangements with the donor hospitals that it serves including respondent Wichita Falls General Hospital. (See text of affidavit, p. A-18, infra.)

Since the writ of prohibition was issued before any discovery relating to the issue of jurisdiction could be commenced, defendant Bolman does not yet know the precise nature of the contract between Wichita Falls General Hospital and the Southwest Organ Bank although he believes that such contract exists and that it contains guidelines for predonation laboratory evalua-

tion of the potential donor, including accurate blood type determination.

On March 21, 1986, respondent Wichita Falls General Hospital was made aware that one of its patients, imminently close to death, was a potential organ donor. One of Wichita's laboratory technicians tested the blood of the potential donor as blood type "A". Wichita thereafter reported to the Southwest Organ Bank, in the manner heretofore described, of the availability of a blood type "A" heart. The Southwest Organ Bank then made a computer search and determined that Robert Ottinger required a type "A" heart. The Southwest Organ Bank then contacted the transplant coordinator at Barnes Hospital who then contacted defendant Dr. Bolman.

After Dr. Bolman was apprised of the available heart, he first telephoned Wichita Falls General Hospital to confirm the availability of an adequate type "A" heart and then immediately flew to Wichita Falls. He proceeded to review the information available about the donor supplied by Wichita, inspected the hospital's blood report as to the blood type and confirmed that the condition of the donor's heart was adequate for transplantation. Dr. Bolman then harvested the donor heart at Wichita Falls General Hospital and flew back to St. Louis to transplant the heart in Mr. Ottinger. A fee of six thousand dollars was charged by the Southwest Organ Bank as a standard heart acquisition fee.

Since Dr. Bolman phoned and then personally appeared at respondent's facility, Wichita was fully aware that the donor heart was destined for a patient at Barnes Hospital in St. Louis, Missouri. Although Wichita asserted in the lower courts that it was not part of its business to solicit donor organs for distribution, Wichita was the motivating force which advised Dr. Bolman and co-defendant Barnes Hospital of the availability of the donor heart. Wichita admitted that it made the initial call to the Southwest Organ Bank, that its representative personally

spoke with Dr. Bolman to discuss the donor's heart and that thereafter it made its facility available for Dr. Bolman to examine the donor and harvest the heart.

During the course of surgery in St. Louis, at a point after the heart was transplanted and profusing and during the process of closing Mr. Ottinger's chest, Dr. Bolman received a telephone call from the Southwest Organ Bank that it had discovered in its Dallas facility that the heart donor had type "B" blood rather than type "A" as originally reported by defendant Wichita. Under the circumstances, Mr. Ottinger's original heart could not be retransplanted nor was an artificial heart available or indicated. Dr. Bolman proceeded to close with the blood type "B" heart.

Initially, Mr. Ottinger did not reject the blood type "B" heart. However, over a period of weeks the transplanted heart showed signs of rejection. A second heart with a compatible blood type "A" was acquired and transplanted. The second heart eventually deteriorated and Mr. Ottinger expired on May 11, 1986.

On August 26, 1986, plaintiff Rose Ottinger, decedent's wife, filed the instant wrongful death action against respondent Wichita Falls alleging that its employee improperly tested the blood type of the first donor and against defendants Barnes and Bolman that they improperly failed to retest the blood type prior to transplantation. On October 2, 1986, respondent Wichita filed a motion to dismiss for lack of personal jurisdiction and venue and a motion to quash service of summons. Before those motions were ruled upon, cross-claims were filed by defendants Bolman and Barnes alleging the Texas hospital's negligence in typing the blood of the first donor heart.

Wichita asserted in the lower courts that it had insufficient contacts with the State of Missouri to make it amenable to service of process. Wichita did not dispute that it knew that it was particating in an interstate information network designed to culminate in the transplantation of a heart in St. Louis,

Missouri. Wichita did not dispute that it undertook to test the blood type of the donor heart in its facility knowing that this was a crucial factor in the decision to safely transplant the heart into Mr. Ottinger. Wichita did not dispute that it reported the blood type of the donor heart to plaintiff's St. Louis doctor and knew that he would rely upon the information. Wichita did not dispute that its employee was the only person who typed the blood of the donor heart. Wichita further did not dispute that its testing was incorrectly done and that the report erroneously stated the blood type of the donor. Finally, Wichita did not dispute that this directly led to the implantation of an incompatible heart in decedent Robert Ottinger, whose death therefrom is the gravamen of this lawsuit.

REASONS FOR GRANTING THE WRIT

Petitioner properly permitted exercise of jurisdiction over Respondent Wichita Falls General Hospital in that Respondent committed a tort in the State of Missouri when its misclassification of a blood type of the donor heart set in motion a course of conduct which produced actionable and forseeable consequences in Missouri and which served as sufficient minimum contacts with Missouri, to hold respondent amenable to service of process by virtue of the Missouri long arm statute, Section 506.500, Missouri Revised Statutes, (1978), and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

In order for a Missouri court to invoke jurisdiction over a non-resident defendant, two elements must be present. The act sued upon must arise out of the activities enumerated in the Missouri long arm statute and the defendant must have sufficient minimum contacts with the State of Missouri to satisfy due process requirements. *Medicine Shoppe Intern, Inc. v. J. - Pral Corporation,* 662 S.W.2d 263 (Mo. App. 1983). The activities of respondent Wichita Falls General Hospital (hereinafter Wichita) clearly meet both of these prerequisites to jurisdiction.

The provisions of the Missouri long arm statute read in pertinent part as follows:

> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submit such person, firm or corporation, and if an individual, his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts...
>
> *(3) the commission of a tortious act within this state.*

Missouri law has construed the phrase "commission of a tortious act within this state" to include extra-territorial acts of a defendant producing actionable consequences in Missouri. *Fulton v. Chicago Rock Island & Pacific Railroad Co.*, 481 F.2d 326 (8th Cir. 1973). The Missouri Court of Appeals below held that respondent Wichita's blood typing misclassification of the donor heart was sufficent to meet the statutory requirement of the commission of a tortious act in Missouri. However, it held that the application of the Missouri long arm statute in this case would violate Wichita's due process rights under the Fourteenth Amendment. *State of Missouri ex rel. Wichita Falls General Hospital v. The Hon. George A. Adolf,* No. 52539, Slip Opinion at 10 (Mo. App. March 10, 1987).

The Due Process Clause limits the power of a state court to render a valid personal judgment against a non-resident defendant. The ultimate objective of Section 506.500, Missouri Revised Statutes (1978), is to extend the jurisdiction of the courts of Missouri over non-resident defendants to the extent permissible under the Due Process Clause of the Fourteenth Amendment. *State ex rel. Deere & Co. v. Pinnel,* 454 S.W.2d 889 (Mo., en banc, 1970); *State ex rel. Apco Oil Co. v. Turpin,* 490 S.W.2d 400 (Mo. App. 1973). Recent U.S. Supreme Court precedent makes it imminently clear that petitioner correctly decided that Wichita Falls is subject to the jurisdiction of the Missouri courts.

The extent of jurisdiction permissible under the Due Process Clause was first articulated by the United States Supreme Court in *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). The court established in *International Shoe* that a state can only exercise *in personam* jurisdiction over a non-resident defendant if there exists "sufficient minimum contacts" between the defendant and the foreign state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe,* 326 U.S. at 316. The Supreme Court explained in later cases that it would

be primarily concerned that the nature of the defendant's contacts are such that the defendant has sufficient notice that it might be sued in the foreign state. *Burger King Corporation v. Rudzewicz,* 471 U.s. 462 (1985); *Worldwide Volkswagen Corporation v. Woodson,* 444 U.S. 286, 297 (1980). In short, the crux of due process analysis is whether "the defendant's conduct and connections with the foreign state are such that he could reasonably anticipate being hailed into court there." *Worldwide Volkswagen,* 444 U.S. at 297 (1980). The Supreme Court in *Burger King,* quoting the above language from *Worldwide Volkswagen,* recently reaffirmed this focus.

If a defendant has sufficient connection with the foreign state to put it on notice that it might be sued there, the defendant cannot avoid jurisdiction "merely because it did not physically enter the foreign state." *Worldwide Volkswagen,* 444 U.S. at 542-43 and *Burger King Corporation,* 471 U.S. at 462. Further, once a court determines that the defendant's contacts with the foreign state should have put it on notice of the potential for suit in that state, the court can consider other factors such as the foreign state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief and the interstate judicial system's interest in obtaining the most efficient resolution of controversies to establish "the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King,* 471 U.S. at 462. Finally, when a "defendant who purposely has directed his activities at foreign residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King,* 471 U.S. at 544.

Applying the above-quoted principles to the instant case, it is clear that a Missouri court can properly exercise jurisdiction over Wichita Falls General Hospital. First, the nature of Wichita's contacts with Missouri put it on notice that it might be sued in Missouri for negligence. As outlined in the Statement

of Facts, Wichita participated in the donor bank system knowing that the organ it made available could be sent to any state, including Missouri. Further, Wichita specifically contracted with a nationwide system for the distribution of organs whose sole purpose is to supply organs to recipients nationwide. In this particular case, Wichita had actual knowledge that the donor heart would be sent to St. Louis, Missouri, and thereafter transplanted into Robert Ottinger. Wichita had multiple contacts with the transplant team when the team was still in Missouri and knew that the St. Louis surgeon was relying on the blood typing test generated at Wichita Falls. Wichita invited the transplant team to its facility and met with the members of the transplant team to discuss the results of its tests, including the blood test. It provided the transplant team with the facilities and instruments to enable the team to harvest the donor heart. Finally, Wichita received money for the donated organ as a result of the heart transplant which occurred in St. Louis, Missouri.

The Supreme Court in *Worldwide Volkswagen* first established that the defendant's ability to foresee litigation in the foreign state was critical to due process analysis. In that case, the court held that a New York car dealership was not amenable to the *in personam* jurisdiction of an Oklahoma court because it had no reason to anticipate that the New York resident to whom the vehicle was sold in New York would sue it in Oklahoma. Unlike the car dealer in *Worldwide Volkswagen,* Wichita could foresee that if it incorrectly typed the blood of the donor heart, it could be sued for negligence in Missouri. The Ottingers were Missouri residents. The transplant team was from St. Louis, Missouri. Wichita sent the heart back with the transplant team to St. Louis, Missouri with actual knowledge that the surgery would be conducted in Missouri. Wichita received money arising out of the surgery. Its role with respect to the heart which entailed establishing the blood type of the donor heart had actionable consequences in Missouri. Finally, Wichita Falls knew that if it

incorrectly typed the heart and Mr. Ottinger died as a result of this mistyping, he would die in Missouri. Under these circumstances, it is inconceivable that Wichita's tortious conduct would be prosecuted anywhere but in Missouri.

Policy considerations also present in the instant case "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimal contacts than would otherwise be required." *Burger King,* U.S. 471 at 462 (1985). Missouri has great interest in adjudicating the plaintiff's dispute. The plaintiff and two of the three defendants reside in Missouri. Essential witnesses and evidence are in Missouri. In addition, Missouri courts have an interest in providing a forum for its residents who have allegedly been harmed due to the negligent act (i.e., erroneous blood typing) of a foreign defendant which was directed to its residents. The trial can proceed more efficiently in Missouri than in Texas.

The Respondent is not unconnected with the foreign state. All of the defendants in the underlying case at bar, including Wichita, are in the business of providing health care and should be considered personally amenable to the jurisdiction of Missouri whenever they purposefully avail themselves of the protections of Missouri by advancing health care (i.e., donating organs) in Missouri. This business is not unlike other nonresident commercial entities doing business in Missouri and invoking its privileges and protections. These businesses have been consistently held amenable to process when their extraterritorial acts cause actionable consequences in Missouri. *Simpson v. Dycon International Inc.,* 618 S.W.2d 455 (Mo. App. 1981); *Krug v. Abel,* 716 S.W.2d 17 (Mo. App. 1986).

The Missouri Appellate Court erroneously placed emphasis on the public policy of an out-of-state institution's reluctance in donating hearts if it realizes it must travel to Missouri to defend itself in the event it performs a negligent act. The court failed to consider public policy arguments for the Missouri resident

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donee Ottinger, the Missouri resident surgeon, Dr. Bolman, or the Missouri resident hospital facility, Barnes Hospital, who all might be equally reluctant to accept or harvest hearts from out-of-state jurisdictions knowing the hardship this ruling would impose. The Missouri Court further failed to recognize that when a defendant purposely avails itself of the privilege of conducting activities within a foreign state that it has clear notice that it is subject to suit there and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs through its business or not engaging in the subject activity.

Wichita's action was not simply an isolated occurrence but arose from its efforts to serve, directly or indirectly, the market and demand of donor organs which reaches an interstate market. It is not unreasonable to subject Wichita to suit in one of those states if its alleged negligent action has there been the source of injury to others. The petitioner has not exceeded his power under the Due Process Clause if he asserts personal jurisdiction over Wichita Falls whose alleged wrongful act set in motion a chain of events leading to actionable and foreseeable consequences in the State of Missouri.

CONCLUSION

Wichita Falls General Hospital's negligent blood typing of a donor heart in anticipation of transplantation set in motion a course of conduct which produced actionable and foreseeable consequences in Missouri where the transplantation took place. The resolution of the issue of "minimum contacts" under the U.S. Constitution is found, under the law, by applying fairness and reason. The issue is one of nationwide importance, great public interest, and requires uniform application of law and principle. This is a matter of first impression with a potential for affecting and guiding a substantial segment of health care services in the nation with its attendant legal rights and liabilities. We believe that the Missouri Appellate system has applied a different standard of fairness and reason than that mandated by the U.S. Supreme Court. We respectfully submit that these issues should be addressed through acceptance of this application for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSOURI

May Session, 1987

No. 69335

State ex rel. Wichita Falls General Hospital,
Relator,

vs.

The Hon. George A. Adolf, Judge of the Circuit
Court of the City of St. Louis,
Respondent.

Now at this day, on consideration of Respondent's *Application to transfer the above entitled cause from the* Eastern District *Court of Appeals, it is ordered that said application be, and the same is hereby denied.*

STATE OF MISSOURI — SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May *Session thereof, 1987, and on the* 19th *day of* May *1987, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson City, this 19th *day of* May, *1987.*

/s/ Thomas F. Simon, *Clerk*

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

To: Attorney of Record Page: 1 of 2

From: Deirdre O. Ahr, Clerk Date: April 9, 1987

Re: Motions For Rehearing And/Or Transfer — Denied

1.	50853 -	State of Missouri Boyland, Glen	Resp. vs. App.
2.	51015 -	State of Missouri Oliver, Michael	Resp. vs. App.
3.	51433 -	State of Missouri Winston, Steven	Resp. vs. App.
4.	51468 -	Chemical Dynamics, Inc. etc. Newfeld, Lawrence & Frieda, et al.	App. vs. Resp.
5.	51585 -	Gast, Elizabeth, John & Gayle Ebert, Steve & Allen Kranz	App. vs. Resp.
6.	51586 -	State of Missouri Grant, Ricky Lee	Resp. vs. App.
7.	51657 -	Stewart, Mary Lee Stewart, Johnny Louis	App. vs. Resp.
8.	51683 -	Meeks, Michael M. State of Missouri	App. vs. Resp.
9.	51884 -	State ex rel. Brown, James City of O'Fallon	App. vs. Resp.
10.	52538 -	Pain, Anesthesia & Critical Care Adolf, Hon. George A.	Rel. vs. Resp.

11.	52539 -	Wichita Falls General Hospital	Rel. vs.
		Adolf, Hon. George A.	Resp.

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. 52539

State of Missouri, ex rel. Wichita Falls General Hospital,
Relator,

vs.

The Hon. George A. Adolf, Judge of the Circuit
Court of the City of St. Louis, Missouri,
Respondent.

Original Proceeding In Prohibition

Opinion Filed: March 10, 1987

Relator, Wichita Falls General Hospital, sought and obtained our preliminary order in prohibition to prevent respondent judge[1] from proceeding further against relator in the underlying lawsuit on the basis of a lack of personal jurisdiction.

Relator is a hospital incorporated under the laws of Texas with its principal place of business in Wichita Falls, Texas. It has no agents and does no business in Missouri. Southwest Organ Bank (SWOB) (not a party here or below) is a not-for-profit corporation in Dallas, Texas. It functions essentially as a clearing house for information concerning availability and need for human organs to be used for transplanting. When relator

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[1] Attorneys representing plaintiff and co-defendants Barnes Hospital and Dr. Bolman have appeared separately on behalf of respondent and filed separate briefs.

has organs available for transplant it notifies SWOB of that availability and SWOB, acting through a national network, notifies transplant facilities throughout the country of such availability. On March 20, 1986, relator advised SWOB of the availability from a deceased patient of a blood Type A heart suitable for transplant. By affidavit[2] relator asserted that it received no financial gain from making donor organs available, that such organs were made available as a humanitarian not-for-profit activity and that relator has no control over where the organs are sent. Barnes Hospital in St. Louis, and Dr. Bolman, a cardothoracic surgeon, were advised through SWOB of the availability of a transplantable blood Type A heart located at Wichita Falls General Hospital. Dr. Bolman had a patient, Robert Ottinger, in need of an A type donor heart for transplant. Dr. Bolman contacted relator by telephone to confirm the availability of the organ and then flew to Wichita Falls with a transplant team to harvest the organ. Upon completion of the harvest by Dr. Bolman and his team he returned to Barnes Hospital with the heart. From the time of Dr. Bolman's call, relator was aware of the intention to utilize the heart for transplant into a patient in St. Louis. There is no indication in the record that relator was aware of the geographic location of the potential transplant recipient prior to that call or that it had any contact with Barnes Hospital or any place in Missouri in regard to the donor heart prior to that call. It is not part of relator's business to solicit donor organs for distribution, but if such become available in the treatment of patients it advises SWOB of such availability.

Upon his return to Barnes Hospital, Dr. Bolman commenced transplantation of the heart into Ottinger. After removal of Ottinger's heart and shortly before completion of the operation,

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[2] This was the only affidavit before the trial court at the time of its decision on the motion to dismiss for lack of jurisdiction. In this court additional affidavits have been filed without objection.

Dr. Bolman was advised that in fact the donor hear was a blood type B heart. Having no other heart available, Dr. Bolman completed the operation. After some time Ottinger began rejection of the heart and another transplant was performed with the correct type heart. That heart deteriorated after placement and Ottinger subsequently died. The suit below for wrongful death by Ottinger's widow followed. Relator, Barnes Hospital and Dr. Bolman were named as defendants. Relator was served pursuant to Sec. 506.500 RSMo 1986, the Missouri Long-Arm statute. It filed its motion to dismiss for lack of personal jurisdiction which motion was denied. This proceeding followed.

Prohibition is the proper remedy to prevent further action of the trial court where personal jurisdiction of the defendant is lacking. State ex rel. Boll v. Weinstein, 365 Mo. 117, 295 S.W.2d 62 (Mo. 1956) [10-13].

For Missouri to obtain jurisdiction over a foreign defendant under Sec. 506.500 RSMo 1986, two elements must be present. First the suit must arise out of the activities enumerated in that statute. Secondly, the defendant must have sufficient minimum contacts with Missouri to satisfy due process requirements. Medicine Shoppe International, Inc. v. J-Pral Corp., 662 S.W.2d 263 (Mo. App. 1983) [14]. As to the first requirement our courts have held that "commission of a tortious act within this state" includes extra-territorial acts of negligence producing actionable consequences in Missouri. State ex rel. Caine v. Richardson, 600 S.W.2d 82 (Mo. App. 1980); State ex rel. Apco Oil Co. v. Turpin, 490 S.W.2d 400 (Mo. App. 1973). We can assume that the factual situation before us is sufficient to meet the statutory requirement of the commission of a tortious act in Missouri.

In State ex rel. Deere & Co. v. Pinnell, 454 S.W.2d 889 (Mo. banc 1970) it was held that the Missouri long-arm statute is intended to extend jurisdiction to the limits permissible under the

due process clause of the Fourteenth Amendment. Obviously, it cannot extend beyond those limits. Our inquiry therefore must address jurisdiction over this relator in the context of due process.

The starting point for such an inquiry is International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154 (1945). That case established the use of a flexible standard in determining the requirements of personal jurisdiction by a state over foreign defendants. The test to be applied is whether the defendant, not being present in the jurisdiction, has "certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* 316. The Court then went on to state:

> "That clause [due process] does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations. . . .
>
> "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Id.* 319.

The teaching of *International Shoe* has been refined over the years. In Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228 (1958), the court emphasized that it is a mistake to assume that the trend evidenced by *International Shoe* heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. The Court there held that:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the

> requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Id.* 253.

In Kulko v. Superior Court of California, 436 U.S. 84, 98 S.Ct. 1690 (1978), the court rejected the state court conclusion that where a nonresident defendant has caused an effect in the State by an act or omission outside the State, personal jurisdiction over the defendant arising from that effect may be exercised wherever "reasonable." In assessing the application of the minimum contacts test the facts in each case must be weighed to determine whether the requisite "affiliating circumstances" found missing in *Hanson v. Denckla* are present. *Id.* 92. The minimum contacts test requires that the defendant "purposefully availed himself" of the "benefits and protections" of the forum's laws. *Id.* 94.

The establishment of the requisite contacts is more easily met in a commercial setting. McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199 (1957). There, marketing into the forum, either directly or indirectly, removes the unreasonableness of subjecting the corporation to suit. The "purposefully avails itself of the privilege of conducting activities within the forum State" test of *Hanson v. Denckla* is more easily found where the defendant seeks to obtain economic benefit through commercial activity, direct or indirect, in the state. But even in the economic context the exercise of jurisdiction is not unlimited. This was recognized in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559 (1980). In rejecting the contention that foreseeability alone is a sufficient benchmark for personal jurisdiction, the Court stated:

> "This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being held into court there." *Id.* 297.

In Burger King Corp. v. Rudzewicz, ____ U.S. ____, 105 S.Ct. 2174, 2183 (1985), the Court further addressed the purposeful availment test.

> "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . or of the 'unilateral activity of another party or third person,'. . . . Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." (Emphasis in original).

On February 24, 1987, the United States Supreme Court again addressed the due process restrictions in subjecting foreign corporations to jurisdiction of state courts. Asahi Metal Industry Co. v. Superior Court of California, ____ U.S. ____, ____ S.Ct. ____, 47 CCH S.Ct. Bull. p. B 957. That case deals solely with the area of product liability and non-U.S. companies and factually bears no resemblance to that before us. It is of some assistance nevertheless. First, it is clear from all opinions in that case that the minimal contacts required in the products liability area involving stream of commerce are less stringent than in other areas. Secondly, it is again emphasized in the various opinions that the basic due process test is whether defendant has taken an actions purposefully directed toward the forum state. The difference between the three opinions is the degree to which injection of a product into the stream of commerce alone is sufficient to establish "purposeful availing."

Finally, the case clearly establishes that the "traditional notions of fair play and substantial justice" language of *International Shoe* is a separate test, related to but not identical with the minimum contacts test. That portion of the opinion in which all justices concurred indicates that both tests must be met.

With this background from the United States Supreme Court, we turn to Missouri law. In the posture of this case that examination can be largely limited to the two cases entitled State ex rel. Sperandio v. Clymer, 568 S.W.2d 935 (Mo. banc 1978) (Sperandio I) and 581 S.W.2d 377 (Mo. banc 1979) (Sperandio II).

We do not find helpful the line of Missouri cases dealing with product liability because the General Assembly has by Sec. 431.069 RSMo 1986 specifically declared that procurement, processing, distribution or use of human organs or blood for transfusing or transplanting into the human body, is for all purposes, the rendition of a service and not a sale. This case therefore does not fit under the less stringent tests applied to products liability cases and the "stream of commerce."

The *Sperandio* cases involved a suit against a doctor in Utah who, upon request, rendered gratuitous advice to a Missouri physician concerning a prospective operation on a Missouri resident. In *Sperandio I,* the court upheld Long Arm jurisdiction. In so doing it found two "contacts" sufficient to satisfy due process. Those were: (1) Missouri's interest in securing redress for its citizen who was injured in Missouri and had no contact with Utah and (2) that the Utah doctor's acts were performed for the purpose of causing an effect in Missouri. In reaching that conclusion the court found that the Utah doctor knew the information he conveyed would be utilized in Missouri to aid in performing an operation on a Missouri resident. In short the injury sustained by the Missouri resident in Missouri was foreseeable by the Utah doctor. Upon certiorari to the United States Supreme Court, 439 U.S. 812, 99 S.Ct. 69 (1978), the

judgment in *Sperandio I* was vacated and the cause remanded "for further consideration in the light of" *Kulko, supra.* Upon remand the court in *Sperandio II* found an absence of sufficient minimum contacts to meet due process requirements. Relying upon *Kulko,* the court rejected the sufficiency as a minimum contact of defendant having caused an effect in Missouri. It found rather that the Utah doctor had not purposefully availed himself of the privilege of conducting activities within the forum state so as to invoke the benefits and protection of its laws. Respondent seeks to distinguish *Sperandio II* on the basis of a statement therein that the record did not establish that the Utah doctor knew his suggested technique would be followed (a finding directly contrary to the finding by the same court in *Sperandio I*). We do not consider that a valid distinction as the key element of *Sperandio II* is the absence of purposeful availing of benefit from his activities relating to Missouri, not his knowledge of the effects of his activities.

We turn to the facts before us. On those facts we are unable to find the requisite minimum contacts sufficient to satisfy due process requirements. By express statutory directive, we are dealing with a service, not a sale or a product. While not of particular importance we note that the negligence alleged occurred prior to any knowledge of Missouri involvement in the transplant. Relator initiated no contact with Missouri. The involvement with Missouri was initiated by third parties, Barnes Hospital and Dr. Bolman. Relator advised SWOB of the availability of an organ. That availability was to anywhere the need existed and relator made no determination of the geographic location of the recipient. The record demonstrates no history of contacts by relator with Missouri, no utilization of the benefits of the laws of Missouri, and no purposeful selection of Missouri as the recipient of the heart. The record demonstrates that the utilization of the organ in Missouri was foreseeable in the general sense that any state might receive it before contact by Dr. Bolman and foreseeable specifically thereafter. The record further establishes that supplying of the

organ had an effect in Missouri. But, the contact with Missouri was "random" and "fortuitous" and was the result of the unilateral activity of Dr. Bolman and Barnes Hospital. Neither the foreseeability nor the effect nor both together is sufficient under the cases to establish "minimum contacts".

In affidavits filed in this court, but not before the trial court, certain facts have been presented establishing that money was received by relator as a result of supplying the organ. On the record before the trial court the only fact concerning money was the affidavit that relator received no financial gain for making the organ available. The parties appear to have tacitly agreed that we may consider the additional affidavits presented here, and in the interest of finally resolving this issue we will do so. SWOB paid the donor hospital for certain of its expenses in connection with the testing and preservation of the organ. In this case relator received $1,159.90 from SWOB. The amounts reimbursable under the agreement between relator and SWOB are less than the actual cost to relator for evaluating and maintaining the donor body and relator generally, and here specifically, sustains a financial loss as a result of involvement in the organ donor program. We are unable to conclude that these additional facts establish a commercial activity by relator. Relator is not in the business of selling organs. It makes available organs which fortuitously result from its treatment of patients. For its efforts in evaluating and maintaining the organs in transplantable condition, certain of its expenses are reimbursed by SWOB. Under the Missouri statute relator performed a service, it did not sell a product. It's activity does not under these facts constitute the type of commercial activity found in certain heretofore cited cases as establishing a "purposeful" availing of the benefits of the forum.

Burger King Corporation v. Rudzewicez, *supra,* and Asahi Metal Industry Co. v. Superior Court, *supra,* established that once it is decided that defendant purposefully established minimum contacts with the forum state those contacts may be

considered with other factors to determine whether imposition of personal jurisdiction would comport with "fair play and substantial justice." We do not find that sufficient minimum contacts are present here to require exploration of additional factors. Consideration of such factors would not alter our result. The assertion most frequently pressed, and urged by respondent here, is the forum's interest in redress of its citizens injured within the state. That is certainly an important policy concern. But the state has an equally strong, if not stronger interest, in protecting the life and health of its citizens. Out decision does not preclude plaintiff below from recovery from relator. It relegates her to seek that recovery from the Texas courts. This is a matter of convenience. A holding subjecting relator to suit in Missouri could well have serious adverse effects upon Missouri residents rising far beyond inconvenience.

As this case makes clear the demand for donor organs exceeds the supply. Missouri is an important organ transplant center and must seek its supply of those organs from throughout the country and possibly the world. Transplant surgery is still in its early years. By its nature it is high risk surgery and presumably the treatment of last resort in most cases. Because of its high risk and the possibility of lethal results if unsuccessful it has great potential as a source of malpractice litigation. The cases which come before us in the malpractice area reflect that generally in such actions every facility and doctor having any connection with the surgery or treatment performed is joined regardless how tenuous its or their culpability may be. Hospitals making organs available do so for moral and humanitarian reasons. We know of no legal requirement they do so and we know of no reason why they could not simply refuse to make transplantable organs available or limit the forums to which they will make them available. Negligence does occur in hospitals and erroneous blood typing occurs in even the best of hospitals. See Barnes Hospital v. Missouri Commission on Human Rights, 661 S.W.2d 534 (Mo. banc 1983). Hospital

employees, as human beings, make mistakes, and the administrators of hospitals surely are aware of this. If the threat of having to defend a potential malpractice action, meritorious or otherwise, in a far distant jurisdiction serves to cause even one hospital to refuse to provide an organ necessary to keep a Missouri resident alive the results far outweigh the inconvenience of requiring Missouri residents to sue in the hospital's home forum. Missouri has restricted the availability of some tort concepts in some humanitarian medical treatment situations where human life is at stake. Sec. 537.037 RSMo 1986. We do not believe it in keeping with that public policy to place the convenience of Missouri residents in litigating above the interest of the public in having transplantable organs available. Respondent's argument that being subject to suit here may make hospitals more careful, is premised on the supposition that only negligent hospitals are subjected to malpractice suits in foreign jurisdictions. It overlooks the fact that when organs are supplied for humanitarian reasons the potential of responding to foreign jurisdiction lawsuits may serve to terminate or reduce that supply to those jurisdictions. We are unable to conclude that imposition of personal jurisdiction over relator in Missouri would comport with "fair play and substantial justice."

Writ of prohibition made permanent. Respondent is directed to sustain the motion to dismiss of relator. Relator's motion to strike is denied.

/s/ Gerald M. Smith, Judge

Snyder, C.J., C. Gaertner, J., Concur

APPENDIX D

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

Rose Ottinger,
Plaintiff

vs.

Wichita Falls General Hospital, et al,
Defendants

No. 862-2807 Div. #1; December 2, 1986

MEMORANDUM FOR CLERK

Defendant Wichita Falls General Hospital's motion to dismiss overruled.

SO ORDERED:

/s/ George A. Adolf, Judge

cc: James Koester, Esq.
Shepherd, Sandberg & Phoenix
Joseph Kortenhof
Moser, Marsalek, Carpenter, Cleary, Jaeckel & Keaney

APPENDIX E

Sec. 506.500 Mo. Rev. Stat. 1978

506.500 Actions in which outstate service is authorized—jurisdiction of Missouri courts applicable, when

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting;

(6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

2. Any person, whether or not a citizen or resident of this state, who has lived in lawful marriage within this state, submits himself to the jurisdiction of the courts of this state as to all civil actions for dissolution of marriage or for legal separation and all obligations arising for maintenance of a spouse, support of any child of the marriage, attorney's fees, suit money, or disposition of marital property, if the other party to the lawful marriage continues to live in this state or if a third party has provided support to the spouse or to the children of the marriage and is a resident of this state.

3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

APPENDIX F

EXHIBIT A

AFFIDAVIT

R. Morton Bolman, III, M.D., having been duly sworn, states:

1. I am a physician licensed to practice medicine in the State of Missouri. My specialty is cardiothoracic surgery. I was the physician in charge of the heart transplant of Mr. Robert Ottinger, whose wife, Rose Ottinger, has filed a wrongful death action in the Circuit Court of the City of St. Louis secondary to her husband's treatment;

2. On March 21, 1986, the transplant coordinator at Barnes Hospital received a call from the Southwest Organ Bank of Dallas, Texas, with information about the availability of a blood type A heart for my patient, Mr. Ottinger, at Wichita Falls General Hospital in Texas.

3. That in contacting the Southwest Organ Bank, Wichita Falls General Hospital knew that the donor heart could be sent to any state, including Missouri, for transplant;

4. I thereafter placed a call to Wichita Falls General Hospital in Texas and spoke with a physician about the potential donor. We spoke about the past medical history of the patient and about various tests to be performed on the patient to determine if his heart was adequate for transplantation;

5. Upon being advised that there was nothing to contraindicate harvesting the heart, I and a small support team flew to the Wichita Falls General Hospital in Texas to examine the data available on the donor patient. Wichita Falls General Hospital employees observed my actions which culminated in the harvesting of the donor heart for eventual transplantation;

6. Employees of Wichita Falls General Hospital knew that I was a thoracic surgeon and that I would use the donated heart which I took from their facility to transplant into a patient at Barnes Hospital in St. Louis, Missouri.

Further, Affiant sayeth not.

/s/ R. Morton Bolman, III, M.D.

Subscribed and sworn to before me, a Notary Public, this 15th day of December, 1986.

/s/ Francis Lorraine Grubbs
Notary Public

My Commission Expires: July 8, 1989

EXHIBIT B

SUPPLEMENTAL AFFIDAVIT

R. Morton Bolman, III, M.D., having been duly sworn, states:

1. I am a physician licensed to practice medicine in the State of Missouri. My specialty is cardiothoracic surgery. I was the physician in charge of the heart transplant of Mr. Robert Ottinger, whose wife, Rose Ottinger, has filed a wrongful death action in the Circuit Court of the City of St. Louis secondary to her husband's treatment. I earlier filed an affidavit with the Court which was attached to my suggestions in opposition to Relator Wichita Falls General Hospital's petition for writ of prohibition;

2. In addition to the information in the affidavit I previously presented to this Court, I wish to point out that Washington University School of Medicine participates in the North American Transplant Coordinator's Association and the United Network of Organ Sharing which have computerized listings of transplant recipients in need of organs. The Southwest Organ Bank of Dallas, Texas and Relator Wichita Falls General Hospital also participate in this network. All participants understand that organs will be shared interstate according to need and availability;

3. The donor hospitals in this program, including Relator Wichita Falls General Hospital, are responsible for performing predonation laboratory evaluation of the donor, including accurate blood type determination;

4. Organs are shared by virtue of communications between independent procurement agencies, such as the Southwest Organ Bank in Dallas, Texas, and the Mid-American Transplant Association in St. Louis, Missouri, with medical centers who have listed a need for organs based upon recipients. Such was the case with Mr. Ottinger where the North American

Transplant Coordinator Association's computer listing was accessed to offer a heart for Mr. Ottinger;

5. The Southwest Organ Bank of Dallas, Texas has contractual arrangements with the donor hospitals that it serves, which I presume includes Relator Wichita Falls General Hospital.

Further, Affiant sayeth not.

/s/ R. Morton Bolman, III, M.D.

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

Subscribed and sworn to before me, a Notary Public, this 5th day of January, 1987.

/s/ Francis Lorraine Grubbs
Notary Public

My Commission Expires: July 8, 1989

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 52539

State of Missouri, ex rel., Wichita Falls
General Hospital,
Relator,

v.

The Honorable George A. Adolf, Judge
of the Circuit Court of St. Louis City, Missouri,
Respondent.

Circuit Court of the City of St. Louis, Missouri
Cause No. 862-02807

AFFIDAVIT

COMES NOW Stephen D. Haid, and after first being duly sworn, deposes and states upon his personal knowledge as follows:

1. That I am Stephen D. Haid, Supervisor of Retrieval Services for Southwest Organ Bank.

2. That in my capacity as Supervisor of Retrieval Services, I have personal knowledge of what charges Southwest Organ Bank will pay a hospital which makes a donor organ available.

3. That Southwest Organ Bank will pay such a hospital for its laboratory work (i.e., blood chemistry, urine analysis, liver analysis, etc.) its operating charges, anesthesia charges, and charges for its cardiology consult.

4. That in the instance of the heart which Wichita Falls General Hospital made available to Barnes Hospital in March of 1986, Southwest Organ Bank paid Wichita Falls General Hospital $1,159.80.

5. Further, the affiant sayeth not.

/s/ Stephen D. Haid

STATE OF TEXAS)
)
COUNTY OF DALLAS)

SUBSCRIBED AND SWORN to before me this 5th day of January, 1987.

/s/ Tanya L. Sanborn
Notary Public

My commission expires: 12-17-88